Supreme Court, U.S.
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No. 92-1684

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

MCI TELECOMMUNICATIONS CORPORATION,
Petitioner,

v.

AMERICAN TELEPHONE & TELEGRAPH COMPANY,
FEDERAL COMMUNICATIONS COMMISSION, and
UNITED STATES OF AMERICA,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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AT&T's BRIEF IN OPPOSITION

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QUESTION RESTATED

Whether the D.C. Circuit correctly held that the Federal Communications Commission has no authority to "remove" the statutory requirement of 47 U.S.C. § 203 that all common carriers file their rates with the Commission and charge only the filed rate.

STATEMENT REQUIRED BY RULE 29.1

American Telephone and Telegraph Company ("AT&T") has no parent company. AT&T Technologies (formerly Western Electric Company), AT&T Capital Corporation (and its subsidiary AT&T Credit Corporation), and Teradata Corporation are subsidiaries of AT&T having outstanding debt in the hands of the public.

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STATUTE INVOLVED

Petitioner MCI Telecommunications Corporation ("MCI") reproduces a portion of the relevant language from the applicable statute, Section 203 of the Communications Act of 1934, 47 U.S.C. § 203. The petition omits with an ellipsis, however, the most pertinent language of Section 203(c). The full text of Section 203(c) is set forth below, with the portion omitted by petitioner italicized:

> (c) Overcharges and rebates. No carrier, unless otherwise provided by or under authority of this chapter, shall engage or participate in such communication unless schedules have been filed and published in accordance with the provisions of this chap-

> ter and with the regulations made thereunder; *and no carrier shall (1) charge, demand, collect, or receive a greater or less or different compensation for such communication, or for any service in connection therewith, between the points named in any such schedule than the charges specified in the schedule then in effect, or (2) refund or remit by any means or device any portion of the charges so specified, or (3) extend to any person any privileges or facilities in such communication, or employ or enforce any classifications, regulations, or practices affecting such charges, except as specified in such schedule.*

STATEMENT OF THE CASE

Petitioner MCI seeks review of a decision of the D.C. Circuit that does not conflict with any decision of this Court or any other court of appeals. To the contrary, that decision was compelled by this Court's decision in *Maislin Industries U.S., Inc.* v. *Primary Steel, Inc.*, 497 U.S. 116 (1990), by prior court of appeals' decisions, and by the plain language of the statute it applied.

1. Section 203 of the Communications Act of 1934, 47 U.S.C. § 203, sets forth for telecommunications common carriers what has come to be known as the "filed rate" doctrine. That doctrine "prohibits a[ny] regulated entity from charging rates 'other than those properly filed with the appropriate federal regulatory authority.'" *Consolidated Edison Co.* v. *FERC*, 958 F.2d 429, 431 n.2, 432 (D.C. Cir. 1992) (citations omitted).

Sections 203(a) and 203(c) prescribe complementary obligations and prohibitions. Section 203(a) establishes the mandatory ratefiling obligations:

> Every common carrier . . . *shall* . . . file with the Commission and . . . keep open for public inspection schedules showing *all* charges for itself . . . and showing the classifications, practices, and regulations affecting such charges.

47 U.S.C. § 203(a) (emphasis added). Section 203(c) establishes the counterpart prohibitions against the provision of service at any rate other than that filed:

> [*N*]*o* carrier shall (1) charge, demand, collect, or receive *a greater or less or different compensation* for such communication, or for any service in connection therewith, between the points named in any such schedule *than the charges specified* in the schedule then in effect, or (2) *refund or remit* by any means or device *any portion of the charges so specified*, or (3) extend to any person any privileges or facilities in such communication, or employ or *enforce any classifications, regulations, or practices affecting such charges, except as specified in such schedule.*

47 U.S.C. § 203(c) (emphasis added).

2. In the early 1980's, the FCC initiated a proceeding—known as *Competitive Carrier*—in which it addressed the scope of Section 203. In successive Reports in that proceeding, the FCC adopted a series of rules each applying different regulatory requirements to respondent American Telephone and Telegraph Co. ("AT&T") than to its competitors (whom it termed "nondominant carriers"). In particular, the FCC determined in its *Fourth Report* to "forbear" from "applying" to AT&T's competitors, including MCI, the ratefiling requirements of Section 203. The FCC acknowledged that the filing of rates was "a" congressionally-selected "means for the Commission to ensure the Act's objective of reasonable and not unjustly discriminatory rates." But the Commission concluded that, because of intervening events that Congress could not have foreseen, the "fundamental goals" of the Act would better be served by this new "forbearance" policy.[1]

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[1] *See Policy and Rules Concerning Rates for Competitive Common Carrier Servs. and Facilities Authorizations Therefor*, CC Docket No. 79-252, Second Report and Order, 91 F.C.C.2d 59, 70-71

No party sought judicial review of those orders. In 1984, however, the FCC decided in its *Sixth Report* not only to "forbear" from "applying" the ratefiling requirement to non-dominant carriers, but affirmatively to prohibit such filings.[2] MCI petitioned for review of that rule. It contended that the *Sixth Report* was "in direct violation of Section 203 of the Communications Act, which provides that *every* common carrier *shall* file tariffs with the Commission."[3]

The D.C. Circuit agreed and vacated the *Sixth Report*. It held that Section 203's requirements that "every" common carrier "shall" file its rates, 47 U.S.C. 203(a), and that "no" common carrier "shall" charge any rates other than those so filed, impose mandatory obligations on common carriers that the agency has no power to waive. *MCI Telecommunications Corp.* v. *FCC*, 765 F.2d 1186 (D.C. Cir. 1985).

The FCC argued in that appeal that its power to "modify" the requirements of Section 203 in "particular instances" or "special circumstances" under Section 203 (b)(2), 47 U.S.C. § 203(b)(2), permitted it to exempt carriers from the statutory filing requirements entirely. The court rejected that assertion. *Id.* at 1191-92. It noted that the FCC's position was inconsistent not only with the plain language of the statute, but with decisions of the Court of Appeals for the Second Circuit, *id.* at 1192 (citing *AT&T* v. *FCC*, 572 F.2d 17, 25 (2d Cir. 1978), and *AT&T* v. *FCC*, 487 F.2d 865 (2d Cir.

(1982) (*"Second Report"*); *id.*, Fourth Report and Order, 95 F.C.C.2d 554 (1983) (*"Fourth Report"*).

[2] *See Policy and Rules Concerning Rates for Competitive Common Carrier Servs. and Facilities Authorizations Therefor*, CC Docket No. 79-252, Sixth Report and Order, 99 F.C.C.2d 1020 (1985) (*"Sixth Report"*).

[3] *MCI Telecommunications Corp.* v. *FCC*, No. 85-1030 (D.C. Cir.), Br. of MCI, p. 10 (Apr. 1, 1985) (emphasis in original).

1973)), and, until very recently, with decisions of the FCC itself. *Id.* at 1192-93 (citing *Western Union Tel. Co.*, 75 F.C.C.2d 461, 474 (1980)). Finally, the court stated that, in light of its holding vacating the *Sixth Report*, the FCC's earlier "forbearance" order could continue to stand, if at all, only as an exercise of the agency's enforcement discretion rather than as a rule that purported to eliminate the statutory ratefiling obligation. *Id.* at 1190-91 n.4.

Following this decision, the FCC filed a brief in a related case in the D.C. Circuit in which it characterized the *Fourth Report*. It stated that the "forbearance" policy of the *Fourth Report* was an exercise of its enforcement discretion that had no effect on Section 203's "unalterable command" that all carriers file all their rates:

> "[W]hether or not Section 203 is read as an unalterable command that carriers file tariffs with the FCC, the decision of the FCC not to enforce that statute . . . is an exercise of [its] enforcement discretion and presumptively unreviewable.[4]

See Pet. 13a.

3. Notwithstanding the 1985 decision of the court of appeals, MCI began in mid-1987 to violate Section 203 by refusing to file rates for many of its services. When it learned of this practice, AT&T filed a complaint with the FCC under Section 208 of the Act, 47 U.S.C. § 208,

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[4] *MCI Telecommunications Corp.* v. *FCC*, No. 84-1402 (D.C. Cir.), Br. of FCC, p. 27 (Dec. 26, 1985). Contrary to MCI's misstatement (Pet. 6 n.1), the brief that AT&T filed in this case did not "concede" or "defend" the suggestion that the FCC has the authority to remove the statutory ratefiling requirement. To the contrary, AT&T argued that the FCC's forbearance policy could be defended as having "merely indicated that the Commission would not take enforcement action." *MCI Telecommunications Corp.* v. *FCC*, No. 84-1402 (D.C. Cir.), Br. of AT&T, p. 41 (Jan. 9, 1986). That was the position that MCI and the FCC had taken, and would later abandon.

challenging MCI's violation of its statutory obligations. AT&T explained that this conduct enabled MCI to obtain a substantial and unlawful competitive advantage: it could match or undercut AT&T's published rates, while AT&T was "unable to match [its] competitors' unknown prices." *Regular Common Carrier Conference* v. *United States*, 793 F.2d 376, 379 (D.C. Cir. 1986). AT&T sought a cease and desist order to bring MCI into compliance with the law, and damages for the competitive injuries caused by MCI's violations.

In response to this complaint, MCI admitted that it was not filing rates for many of its services. It attempted to defend this conduct by making an extraordinary "about-face" with respect to the legal position it had *successfully* asserted before the court of appeals in 1985. Thus, although MCI had previously asserted that the *Fourth Report* was merely an exercise of the FCC's enforcement discretion that had no effect on its independent obligations under Section 203, MCI now claimed that the *Fourth Report* exempted it from those obligations *in toto*.[5] And although MCI had previously claimed that any such attempt by the FCC would be unlawful in light of the unmistakably mandatory language of Section 203, it now claimed that the FCC had the authority to waive a carrier's compliance with that statutory obligation.[6]

Ten months after AT&T's complaint had been filed (during which time the FCC took no action to resolve it), this Court decided *Maislin Industries U.S., Inc.* v. *Primary Steel, Inc.*, 497 U.S. 116 (1990), and eliminated

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[5] *Compare MCI Telecommunications Corp.* v. *FCC*, No. 85-1030 (D.C. Cir.), Reply Br. of MCI, pp. 27-28 (May 15, 1985) *with* MCI Answer, *AT&T* v. *MCI*, FCC File No. E-89-297 (filed Sept. 19, 1989), pp. 5-6.

[6] *Compare MCI Telecommunications Corp.* v. *FCC*, No. 85-1030 (D.C. Cir.), Br. of MCI, p. 8 (Apr. 1, 1985) *with* MCI Answer, *AT&T* v. *MCI*, FCC File No. E-89-297 (filed Sept. 19, 1989), pp. 5-6.

any possibility that the FCC might have the authority that MCI claimed. The Court in *Maislin* construed the statutory filing requirements of the Interstate Commerce Act that are the model for Section 203. *Maislin* held that these requirements bind all carriers; that the provision of services at secret, unfiled rates constitutes the unlawful price discrimination that these ratefiling requirements were designed to prevent; and that the Interstate Commerce Commission could not authorize the provision of services at rates lower than the filed rates. *Id.* at 130-35.

The FCC was statutorily required to resolve AT&T's complaint within a year of the complaint's filing. 47 U.S.C. § 208(b)(1). When two and a half years had passed with no agency action, AT&T filed a petition for mandamus with the court of appeals asking the court to direct the FCC to act. The FCC responded by representing that it would rule on AT&T's complaint within 30 days.[7] Based on that representation, the court denied the petition.

4. Approximately 30 days later, the FCC issued its decision denying and dismissing AT&T's complaint. Pet. 20a. That decision stated, for the first time since *MCI* v. *FCC* was decided seven years earlier, that the FCC's forbearance policy was not, after all, "merely an exercise of the Commission's prosecutorial discretion." Rather, the Commission announced it was a "binding substantive rule" that purported to have "removed" the ratefiling requirement. Pet. 27a.

The FCC nevertheless "declined to decide forthrightly" whether such a rule could be lawful in light of *Maislin* and *MCI* v. *FCC*. Pet. 7a. The FCC instead dismissed AT&T's request for a cease and desist order on the ground that it intended to reexamine the lawfulness of

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[7] *In re AT&T*, No. 91-1487 (D.C. Cir.), Response of FCC to AT&T's Petition for a Writ of Mandamus (Dec. 18, 1991).

its forbearance policy in a future rulemaking (Pet. 27a-28a). And it denied AT&T's request for damages on the ground that it would be "unfair" to find MCI liable for its statutory violations when MCI had acted consistently with the FCC's policy (Pet. 26a-27a). Thus, the FCC purported to authorize MCI to continue to violate Section 203, with immunity from damages, at least until the FCC completed a new rulemaking. *See* Pet. 14a.

AT&T petitioned for review, and the court of appeals granted its petition. The court had "little difficulty in concluding" that the FCC's action was arbitrary and capricious. Pet. 12a. It held that the FCC has a statutory obligation under Sections 206-208 of the Communications Act, 47 U.S.C. §§ 206-208, to adjudicate complaints "under the law currently applicable," and that the FCC had failed to do so. Pet. 9a. The court attributed the FCC's "troubling tactics" to an "obvious strategy" of trying to "keep the [forbearance] rule in effect for as long as possible despite serious doubts that the rule could not withstand judicial review." *Id.* at 12a. It then held, in reliance on *MCI* v. *FCC* and *Maislin Industries U.S., Inc.* v. *Primary Steel, Inc.*, 497 U.S. 116 (1990), that the rule was "plainly contrary to Section 203." Pet. 3a. The court observed that the FCC "will have to obtain congressional sanction for its desired policy course." *Id.* at 18a. The case was remanded for the FCC to reconsider AT&T's claims for relief without reliance on its unlawful rule.

5. Approximately one week before the court of appeals issued *AT&T* v. *FCC*, the FCC adopted its Report and Order in the rulemaking proceeding. Pet. 33a. The FCC reiterated its position that Section 203(b) granted it authority to remove the statutory ratefiling requirement. Pet. 42a-51a. It also concluded that Congress had "acquiesced" in this interpretation by failing to enact legislation disapproving it. Pet. 51a-55a.

AT&T has filed a petition for review of the Report and Order, and a motion for summary decision, in the D.C. Circuit. That petition and motion remain pending.

REASONS FOR DENYING THE WRIT

The D.C. Circuit's decision does not present any question that warrants review by this Court. It reaffirms the longstanding "filed rate" doctrine, holding that the rate-filing requirements of the Communications Act are mandatory and that only Congress, and not the FCC, can "remove" them. That holding is compelled by this Court's decision three years ago in *Maislin Industries U.S., Inc.* v. *Primary Steel, Inc.*, 497 U.S. 116 (1990); it is consistent with every other court of appeals' decision to address the issue; and it is plainly a correct reading of the statute.

The administrative law issue raised separately in MCI's petition is equally uncertworthy. MCI is simply wrong in suggesting that the decision below impinged upon the traditional discretion of an agency to choose between rulemaking and adjudication in making policy. The FCC always had the option to decide this statutory issue through rulemaking; it declined for years to exercise that option, and instead elected to create the first reviewable order on the issue by deciding AT&T's complaint in advance of the rulemaking.

I. CONSISTENT WITH EVERY OTHER FEDERAL COURT DECISION ON THE SUBJECT, THE D.C. CIRCUIT CORRECTLY REAFFIRMED THE FILED RATE DOCTRINE IN HOLDING THAT THE FCC LACKS AUTHORITY TO "REMOVE" THE RATE-FILING REQUIREMENT OF SECTION 203.

The court of appeals' holding that the statutory rate-filing requirement is mandatory, and cannot be "removed" by the FCC, presents no conflict with any decision of this Court or any other court. To the contrary, it is consistent with every decision addressing the issue.

This Court expressly reaffirmed this principle in 1990, when it decided in *Maislin* that the Interstate Commerce Commission ("ICC") could not exempt carriers from their statutory obligation to offer service pursuant to tariffed rates.[8] The Communications Act embodies filed rate, non-discrimination, and agency modification provisions that were taken directly from the provisions of the Interstate Commerce Act ("ICA").[9] Indeed, the rate-filing requirements in the two statutes are worded indistinguishably.[10]

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[8] This ruling in *Maislin* was in turn reaffirmed by this Court in *Reiter* v. *Cooper*, 113 S. Ct. 1213 (1993).

[9] *See* S. Rep. No. 781, 73d Cong., 2d Sess. 2 (1934) ("In this bill many provisions are copied verbatim from the Interstate Commerce Act because they apply directly to communication companies doing a common carrier business, but in some paragraphs the language is simplified and clarified. These variances or departures from the text of the Interstate Commerce Act are made for the purpose of clarification in their application to communications, rather than as a manifestation of congressional intent to attain a different objective"); *see also* 73 Cong. Rec. 10313 (1934) (statement of Rep. Rayburn) (ICA Section 6 as basis of Communications Act Section 203); 73 Cong. Rec. 8823 (1934) (statement of Sen. Dill). *See generally American Broadcasting Cos.* v. *FCC*, 643 F.2d 818, 820-21 (D.C. Cir. 1980); *AT&T* v. *FCC*, 487 F.2d 865, 879 (2d Cir. 1973).

[10] *Compare* 47 U.S.C. § 203(a) (Communications Act tariff filing requirement) *with* 49 U.S.C. § 6(1) (original ICA tariff filing requirement) *and* 49 U.S.C. § 10762(a) (recodified ICA tariff filing requirement). *Compare* 47 U.S.C. § 203(b)(2) (Communications Act authorization for particular agency modification of requirements) *with* 49 U.S.C. § 6(3) (original ICA agency authorization provision) *and* 49 U.S.C. § 10762(d)(1) (recodified ICA agency authorization provision). *Compare* 47 U.S.C. § 203(c) (first clause, Communications Act prohibition of service in absence of filed tariffs) *with* 49 U.S.C. § 6(7) (original ICA prohibition against service without filing rates) *and* 49 U.S.C. § 10761(a) (recodified ICA prohibition against service without filing rates). *Compare* 47 U.S.C. § 203(c) (second clause, Communications Act prohibition of rebates or service at other than filed rates) *with* 49 U.S.C. § 6(7) (original ICA anti-rebate provision) *and* 49 U.S.C. § 10761 (recodified ICA anti-rebate provision).

In *Maislin*, this Court construed that language. It held that none of the broad delegations of agency power in the statute empowered the ICC to permit provision of service at unfiled rates. "For a century," the Court explained, it had repeatedly interpreted the statute's tariff filing and non-discrimination provisions as barring carriers' provision of service at unfiled rates, *id.* at 130, and the agency could not depart from this interpretation. *Id.* at 130-36. The Court specifically rejected the agency's assertion that increased competition justified allowing carriers to charge unfiled rates: "exhortations to 'increase competition' cannot provide the ICC authority to alter the well-established statutory filed rate requirements." *Id.* at 135.

The Court further held that allowing carriers to charge rates not contained in tariffs would eviscerate the statutory nondiscrimination requirements contained in both the ICA and the Communications Act. The Court reasoned that charging secret unfiled rates that are below the filed rate is a *per se* violation of the counterparts to Section 202(a) as well as Section 203, and that "compliance with [the tariff filing requirements] is 'utterly central' to the administration of the Act." *Id.* at 132 (quoting *Regular Common Carrier Conference* v. *United States*, 793 F.2d 376, 379 (D.C. Cir. 1986) (Scalia, J.)). The Court explained:

> "[T]he [ICC's] . . . policy, by sanctioning adherence to unfiled rates, undermines the basic structure of the Act. The ICC cannot review in advance the reasonableness of *unfiled* rates. Likewise, other shippers cannot know if they should challenge a carrier's rates as discriminatory when many of the carrier's rates are privately negotiated and never disclosed to the ICC."

Id. (emphasis in original). The FCC's policy is, if anything, in even greater tension with the Act because it allows every common carrier in the industry (except

AT&T and local exchange companies) to offer service at unfiled rates.

MCI's principal argument is that certiorari should be granted because the court of appeals purportedly misapplied *Chevron USA Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Pet. 15-22. However, MCI does not (and cannot) claim that the court of appeals adopted any new interpretation or holding relating to *Chevron*. MCI simply argues that the court did not give the FCC's interpretation of its authority as much deference as MCI believes it should have. That issue is manifestly uncertworthy.

In any event, the decision below is entirely consistent with the principles set forth by this Court for reviewing agency interpretations of statutes. Indeed, the court of appeals simply followed the principles reaffirmed in *Maislin*, which itself addressed the proper application of *Chevron* in this context. 497 U.S. at 131. This Court in *Maislin* explained that it had previously concluded, in decision after decision, that the requirements of the filed rate doctrine were congressionally mandated and could not be waived or excused by an administrative agency. *Maislin*, 497 U.S. at 130-31. The Court then set forth the framework for review of agency action in such circumstances: "Once we have determined a statute's clear meaning, we adhere to that determination under the doctrine of *stare decisis*, and we judge an agency's later interpretation of the statute against our prior determination of the statute's meaning." *Id.* at 131; *see also Lechmere, Inc.* v. *NLRB*, 112 S. Ct. 841, 847-48 (1992). The court of appeals in this case properly adhered to that approach.

Nor is there any conflict among the courts of appeals on this issue. Those courts have uniformly construed the filed rate requirements and Section 203(b) of the Communications Act as not empowering the FCC to allow carriers to offer services at unfiled rates. Like the

D.C. Circuit, the Second Circuit has surveyed the text and legislative history of Section 203(b) (which it noted was derived directly from the Interstate Commerce Act) and concluded that "under Section 203(b) the Commission may only modify requirements as to the form of, and information contained in, tariffs and the thirty days notice provision." *AT&T* v. *FCC*, 487 F.2d 865, 879 (2d Cir. 1973); *see also AT&T* v. *FCC*, 572 F.2d 17, 25 (2d Cir. 1978) (setting forth Section 203(a)'s tariff filing requirement and stating that "[w]e are aware of no authority for the proposition that the FCC may abdicate its responsibility to perform these duties and ensure that these statutory standards are met").

Indeed, until very recently this was the FCC's understanding as well. Shortly after the FCC initiated its *Competitive Carrier* proceeding, it stated that there was "no question" that tariffs are "essential to the entire administrative scheme of the Act." *Western Union Tel. Co.*, 75 F.C.C.2d 461, 474 (1980). It explained that "[t]he importance of tariffs and the requirement that common carriers—*all common carriers*—must file all of their communications services to the public through published tariffs is well established." *Id.* (emphasis added). Moreover, that was the position the FCC argued to the Second Circuit, when it explained that "[t]he Commission has affirmative commands from Congress to ensure . . . that rates and practices are set forth in tariffs filed with the FCC," and "[t]he agency has no authority to ignore these commands, even if market forces are present which undercut the 'natural monopoly' justification for regulation." *AT&T* v. *FCC*, 572 F.2d 17 (2d Cir. 1978), Brief of FCC, pp. 49-50 (quoted in *MCI Telecommunications Corp.* v. *FCC*, 765 F.2d 1186, 1193 (D.C. Cir. 1985)).

The plain meaning of Section 203 confirms that the courts of appeals' uniform interpretation, and the FCC's previous interpretation, of Section 203(b) is compelled. First, Section 203(b) authorizes the FCC only to "mod-

ify," rather than to eliminate or abandon, the tariff filing requirement at the heart of the Act. *See MCI Telecommunications Corp.* v. *FCC*, 765 F.2d at 1192 (quoting *Black's Law Dictionary* 905 (5th ed. 1979): " 'modify' defined as '[t]o alter; to change in incidental or subordinate features; enlarge, extend; amend; limit, reduce' ").[11] Second and more fundamentally, even the FCC's power to modify is limited to "special circumstances or conditions." 47 U.S.C. § 203(b)(2). The FCC's forbearance policy, in contrast, makes avoidance of the tariff filing requirement the general rule applicable to hundreds of carriers, and leaves the Act's central filing requirements applicable only to a handful, including AT&T.

Section 203(c) confirms that the FCC's modification power does not extend to allowing carriers to offer services at unfiled rates. The first clause of Section 203(c) requires that tariffs be filed in accordance with provisions governing their form and content, "unless otherwise provided by or under authority of this chapter." MCI relies on this clause to argue that the FCC has sweeping authority under Section 203(b) to eliminate the requirements of Section 203(a) and 203(c). Pet. 19. But MCI totally fails to mention Section 203(c)'s second clause, which prohibits charging rates other than those filed in tariffs. This clause is unqualified and not similarly subject to the FCC's modification power.[12]

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[11] For example, Section 203(b) may authorize the FCC to forego *federal* tariffing in those cases where it chooses to defer to state regulation and state tariffing requirements that would not otherwise interfere with the objectives of the Communications Act. *Compare Diamond International Corp.* v. *FCC*, 627 F.2d 489 (D.C. Cir. 1980) *with New York Telephone* v. *FCC*, 631 F.2d 1059 (2d Cir. 1980).

[12] In any event, the reference in the first clause of Section 203(c) to exceptions "otherwise provided by or under authority of this chapter" does not suggest that the FCC has an otherwise unstated authority to waive Section 203. That clause refers to

Finally, MCI adopts the FCC's contention, advanced in its separate rulemaking decision, that Congress through the Telephone Operator Consumer Services Improvement Act (TOCSIA), P.L. 101-435 (codified at 47 U.S.C. § 226), "acquiesced in the FCC's present forbearance rules." *Tariff Filing Requirements for Interstate Common Carriers*, CC Docket No. 92-13, *Report and Order*, 7 FCC Rcd. 8072, 8077 (1992). This argument is insubstantial. "[T]he doctrine of legislative acquiescence is at best only an auxiliary tool for use in interpreting ambiguous statutory provisions." *Jones* v. *Liberty Glass Co.*, 332 U.S. 524, 533-34 (1947).[13] Here, the statute—Section 203—is unambiguous, and Congress cannot silently "acquiesce" in an interpretation contrary to its plain meaning.

In any event, TOCSIA specifically disclaims any such intent or effect. It was enacted to address widespread complaints associated with a narrow segment of the industry—operator service providers. TOCSIA specifically provides—in a provision entitled "Statutory construction" that MCI does not even discuss—that "[n]othing in this section shall be construed to alter the obligations, powers, or duties of common carriers or the Commission under the other sections of this chapter." 47 U.S.C. § 226(i). Because Section 203 is one of the "other sections of this chapter," TOCSIA cannot be read to alter the historic understanding of that section's mandatory ratefiling requirements.[14]

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other provisions of the Act that provide for limited and explicit statutory exceptions to the filing requirements. *See* 47 U.S.C. § 211(b) (expressly authorizing the FCC to "exempt" carriers from submitting copies of "minor contracts").

[13] *See also Arkansas Best Corp.* v. *Commissioner*, 485 U.S. 212, 222 n.7 (1988); *SEC* v. *Sloan*, 436 U.S. 103, 121 (1978); *TVA* v. *Hill*, 437 U.S. 153, 173 (1978).

[14] Contrary to MCI's argument, Pet. 20-21, TOCSIA's requirement that operator service providers file "informational tariffs"

II. THIS CASE DOES NOT PRESENT ANY ISSUES CONCERNING AN AGENCY'S "DISCRETION TO CHOOSE BETWEEN RULEMAKING AND ADJUDICATION."

MCI also contends that the court of appeals' decision impermissibly impinges upon the "traditional discretion of agencies to choose between rulemaking and adjudication." Pet. 23-29. This argument ignores the facts of the case.

The FCC was statutorily obligated to resolve AT&T's complaint in an adjudication. *See* 47 U.S.C. § 208. In any event, however, the FCC has always been able to resolve in a rulemaking proceeding any issues concerning the lawfulness of its forbearance rules. Indeed, once the court of appeals vacated the *Sixth Report* in *MCI* v. *FCC*, the responsible course of action for the FCC would have been to initiate such a proceeding immediately and apply the controlling principles established by the new proceeding. Instead, the FCC simply permitted its forbearance policy to remain in effect for years without reexamination, while taking inconsistent positions on what that rule required—first maintaining that the policy was merely an exercise of its enforcement discretion, and then characterizing the policy as having "removed" the statutory ratefiling requirements. *See supra* pp. 5, 7; *see also* Pet. 13a n.7. The Commission evidently elected to pursue this course of action out of a "desire to keep the rule in effect as long as possible despite serious doubt that the rule could not withstand judicial review." Pet. 12a.

Nor did the filing of AT&T's complaint deprive the FCC of any of its "traditional discretion" to choose be-

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does not become "redundant" if Section 203 is given effect. Section 203 applies only to "common carriers." TOCSIA's tariffing requirement applies more broadly to non-common carriers as well. 47 U.S.C. § 226(a)(9). Those informational tariffs, moreover, are required to contain substantial data that Section 203 does not require be filed, such as amounts of commissions and estimates of traffic volume. 47 U.S.C. § 226(h)(1)(A).

tween rulemaking and adjudication. As the court of appeals noted, "nothing stopped the FCC from initiating a companion rulemaking when AT&T filed its complaint." Pet. 10a. The statutory deadline for resolving complaint proceedings grants the FCC one year. 47 U.S.C. § 208 (b)(1). The rulemaking that the FCC was ultimately forced to initiate, after a two and half year delay and the filing of a mandamus petition, took substantially less time than that to conclude. The FCC could have held AT&T's complaint in abeyance while it proceeded with the rulemaking, completed the rulemaking in less than a year, and then resolved the complaint in accordance with the result of the rulemaking. It declined to do so only because that course would have produced a reviewable order on a matter the FCC preferred to delay.

The court of appeals did no more in this case than apply settled principles of administrative law. When the FCC acts in an adjudication, it is obligated to "decide the complaint under the law currently applicable." Pet. 9a. The final agency action produces a reviewable order, and it is well-established that the lawfulness of a rule can be challenged on appeal of an adjudication applying that rule. *See, e.g., Functional Music, Inc.* v. *FCC*, 274 F.2d 543 (D.C. Cir. 1958); *Commonwealth Edison Co.* v. *NRC*, 830 F.2d 610 (7th Cir. 1987); *Texas* v. *United States*, 730 F.2d 409 (5th Cir. 1984), *amended on reh'g*, 749 F.2d 1144 (5th Cir. 1985); *Tri-State Motor Trans. Co.* v. *ICC*, 739 F.2d 1373, 1375 & n.2 (8th Cir. 1984).

MCI's petition ultimately turns on a factual mischaracterization of the Order under review—the claim that the Order never applied the FCC's rule (Pet. 12). As the court of appeals recognized, however, the agency in this case applied the FCC's rule to deny AT&T relief, and that rule is unlawful. Pet. 14a. The FCC's Order made clear that it understood the forbearance policy to have "remov[ed]" the statutory ratefiling requirement and that that understanding was "effective" prospectively—unless

and until the FCC reached a different decision in its rulemaking proceeding. Pet. 28a. The FCC's Order thus purported to authorize MCI to continue to violate Section 203, with immunity from damages, for at least that interim prospective period. The FCC lacked the statutory authority to take such action, and its Order was properly set aside.

Finally, MCI suggests inconsistently that, far from having discretion to choose between rulemaking and adjudication, the FCC was *obligated* to apply an unlawful rule to AT&T's complaint, and to any other matters that arose, unless and until it repealed that rule in another rulemaking proceeding. Pet. 24-26. This issue is not properly presented by the FCC Order on review in this case. The FCC's position in that Order was that it had the discretion, not the obligation, to deny AT&T's complaint and proceed through a rulemaking. Pet. 28a.

In any event, this Court has never held that an agency is required to apply an unlawful rule, or that a reviewing court is obliged to uphold such action. To the contrary:

> [W]hile agencies are bound by those regulations that are issued within the scope of their lawful discretion . . . they cannot be bound by regulations contrary to law. Otherwise, the [agency] would effectively be empowered to repeal statutes that the Congress enacts.

United States v. *Burke*, 112 S. Ct. 1867, 1876-77 (1992) (Scalia, J., concurring).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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